In the Supreme Court
of the
United States

October Term 1978

No. 78-1695

TIVIAN LABORATORIES, INC.,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST JUDICIAL CIRCUIT

SAM POLUR
Attorney for Petitioner
101 Park Avenue, Suite 1212
New York, New York 10017
Tel.: (212) 227-5816

Attorney Below
RICHARD K. FOSTER, ESQ.
Pole 121, Great Road
Lincoln, Rhode Island 02865

TO: Solicitor General of the
United States
Department of Justice
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST JUDICIAL CIRCUIT

Petitioner Tivian Laboratories, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, rendered in the above-entitled action, and

the denial by that Court of petitioner's motion for a rehearing on said opinion and judgment. The opinion pursuant to which the judgment was entered has not as yet been reported and the Court's subsequent denial of a rehearing was rendered without opinion.

OPINIONS OF THE COURT BELOW

The opion of the United States Court of Appeals for the First Judicial Circuit is printed as Exhibit "A" in the Appendix, annexed to this petition, and the memorandum of the denial of a motion for a rehearing is printed as Exhibit "B" in the said Appendix. The opinion of the United States District of Rhode Island is contained in the Transcript of Proceeding which is printed as Exhibit "C" in the annexed Appendix. The Order and Judgment, entered on that opinion, are printed

as Exhibit "D" in said Appendix. The Order of the District Court's denial of Defendant's motion for a stay of the Order and Judgment is printed as Exhibit "E" in the annexed Appendix.

GROUNDS FOR JURISDICTION

Petitioner invokes the Fourth Amendment of the Constitution of the United States and the violation of petitioner's rights thereunder, as guaranteed against unreasonable search and seizure pursuant to Acts of Congress and the processes of the officials of the United States taken in accordance with such Acts. Petitioner invokes the Due Process Clause of theFifth Amendment of the Constitution of the United States as a reinforcing guarantee to the immunities conferred by the Fourth Amendment and, further, as an affirmative guarantee to a party of his day in court, in accordance with the law of the land, and,

by analogy, with the exercise by this Court of its supervision over the administration of criminal justice by the District Courts of the United States.

DATES OF ADJUDICATION

The opinion of the United States Court of Appeals for the First Circuit was rendered on December 20, 1978, and judgment was entered thereon on December 20, 1978. The denial of petitioner's motion for a rehearing was entered on January 22, 1979. The opinion of the District Court was rendered on February 23, 1978. The Order and Judgment were entered thereon on February 28, 1978. The denial of a stay by the District Court was entered on March 23, 1978.

JURISDICTIONAL STATUTE

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

The primary substantive question is whether the Fourth Amendment has been violated by the provisions of the Water Pollution Prevention and Control Act, 42 U.S.C. section 1318(a) (A)(V), and the Air Pollution Prevention and Control Act, 42 U.S.C. section 1857c-8(a)(1)(E) (amended by Act Aug. 7, 1977, Pub.L. No. 95-95 section 305(d) and transferred to 42 U.S.C. section 7414(a)(i)(I), which authorizes the Environmental Protection Agency (EPA) to "require the owner or any (emission or point) source....to provide (the agency with) such information as(it) may reasonably require" to carry out its responsibilities under these Acts.

The primary procedural question is whether petioner's rights to Due Process of Law under the Fifth Amendment have been violated.

The immediate subsidiary questions are whether petitioner's rights to Equal Protection under the Amendment have been violated both in respect to procedural Due Process and the protection of the Fourth Amendment. The ultimate subsidiary issues are whether petitioner's right to cross-examination by virtue of the Sixth Amendment has here been denied as well as his common law rights reserved by the Ninth and Tenth Amendments; including his right to defend afforded by the doctrine of proximate cause.

DISTRICT COURT JURISDICTION

The United States brought this action on May 6, 1976, for and on behalf of its Agency, "EPA", to compel the defendant to provide the information sought by that Agency pursuant to section 308 of the Federal Water Power Control Act, 33 U.S.C. section 1318, and section 114(a) of the Clean Air Act, section 1857c-9(a). Plaintiff invoked the jurisdiction of the District Court

over the above-described matter pursuant to 28 U.S.C. section 1345, 23 U.S.C. section 1319(b), and 42 U.S.C. section 1857-8(a) (3). From the inception of this controversy, defendant had consistently depended upon the rule, established by Camara v. Municipal Court, 387 U.S. 523, 528-529 (1967) and See v. City of Seattle, 387 U.S.5641,543 (1967), and which it proceeded immediately to plead, that an inspection without a warrant violated the Fourth Amendment.

REASONS FOR ALLOWANCE OF THE WRIT

The defendant was deprived of his day in court in violation of the elementary principle of due process (Pennoyer v. Neff, 95 U.S.714(1878)). The District Court granted summary judgment for the Government without analyzing the applicable law or affording the defendant the opportunity to establish the nature of its business

upon the record. The transcript of the Record of that proceeding (Appendix Exhibit "D") shows that these respective refusals were affirmative, not the re - sult of either neglect or inadvertance. The sole ultimate authority relied upon by the Court of Appeals for its affirmance of the denial of the substantive right of defendant under the Fourth Amendment was Oklahoma Press Publishing Co. v. Walling, 327 U.S.186(L946). That proceeding resulted in the enforcement of the Fair Labor Standards Act.

Upon defendant's motion for rehearing, the Court of Appeals denied relief despite the submission for its consideration of the subsequently rendered opinion of May 23, 1978 of Marshall v. Barlow's, Inc., 436 U.S.307. That opinion shows that the decisions permitting searches or inspection without a warrant belonged in a separate classifica-

tion, together with others. Industries affecting air pollution did not fall either within those pursuits or undertakings, specially subject to warrantless inspection, or those within the history of government oversight through warrantless surveillance such as the conduct of the liquor business or the manufacture, sale and distribution of firearms. Thus, the rationale for sustaining warrantless inspection in Air Pollution Variance Board of Colorado v. Western Alfalfa Corp., 416 U.S. 861 (1974) was the fact that it took place in the open fields pursuant to the exception from the Fourth Amendment established in Hester v. United States, 265 U.S.57 (1924).

Marshall v. Barlow's, Inc., supra, 436 U.S.307, established the principle generally that to come within any exception for the necessity of a

warrant to search the premises of a commercial business, the nature of that business had first, to be established. Obviously, the District Court in the instant proceeding would not permit defendant to prove that its business was such as to come within the general rule. Hence, the absence of a warrant on behalf of the EPA was prima facie proof of the violation of theFourth Amendment. That the demand for the production of documents to be followed by a civil penalty, in the event of refusal, has been a manifest impairment of the law against an unreasonable search and seizure since the fundamental pronouncements of Boyd v. United States, 116 U.S. 616 (1886). That the ostensible civil demand for inspection against the instant petitioner was criminal in character was likewise decided in Boyd Id., 633-634. That holding was preliminary to the admonition with respect to the

historic guarantee in question to withstand beginnings (Id. 635).

The Court in Marshall v. Barlow's, Inc., supra.436 U.S. 307, reinforced this warning for the protection of industries as a whole. Although probably cause does not have to be established in the criminal sense to obtain a search warrant, the facts, nonetheless, have to be established prior to the warrant's issue that the particular business requires that its b uilding may be searched or its documents inspected.

Under these circumstances, the grant by the District Court of summary judgment, its affirmance by the Court of Appeals and the denial by that tribunal of the motion for rehearing, collectively, have deprived petitioner of due process in both the procedural and substantive meanings of that guarantee. These rulings also deprived petitioner of the equal protection of the laws under the Fifth Amendment. Further, in view of

the absence of any proof on the record that petitioner used, or that the use of, PCBs and comparable chemical substances, specifically including chlorinated terphenyls, absolves theGovernment from proving probable cause. In view of the cooperation between federal and state jurisdictions provided by the statutes under review, that joinder binds the Government (Byars v. United States.) 273 U.S.28(19727); Sage v. Hampe, 235 U.S.99 (1914); Graves v. Johnson 179 Mass. 53 (1901).

The extent to which the affirmance of the District Court has invaded constitutional principles, that are genuinely fundamental, may be gauged by the concommittant invasion of the Ninth and Tenth Amendments (Goldberg J.,) concurring in Griswold v. Connecticut, 381 U.S.479, 490 and note (1965);

National League of Cities v. Usery, 426 U.S. 833 (1976); Michelman, States Rights and States Rights and States Roles: Permuta - tions of Sovereignty, in National League of Cities v. Usery, 86 Yale L.J. 1165 (1977); Tribe, Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services, 90 Harv. L.Rev. 1065(1977).

This litigation is a glaring example of the point of DeTocqueville's prophecy that repeated depressions in a manufacturing nation invite centralization with inevitable tyranny (11 Democracy in America, 308-312 (Phillips-Bradley Ed. 1945). The impairment of the adjective principles of due process coupled with the judicial oblivion by the District Court to the common law rights of the petitioner further illuminates the observation of the late Chief Justice White

in McCray v. United States 195 U.S.27,61 (1904) that the Fifth and Tenth Amendments insofar as applicable qualify all other constitutional provisions. The grant of summary judgment against this petitioner under the circumstances resembling criminal prosecution (Boyd v. United States), 116 U.S.,supra.633,634), with the initial demand for the production of records and documents, and the certainty of a civil penalty in the event of refusal, accentuates the disregard of the right to cross-examination under the Sixth Amendment (Greene v. McElroy, 360 U.S.474, 496-501 (1959);5 Wigmoreon Evidence (3rd ed. 1940) section 1367). The totality of the surrounding facts exemplifies the maladministration of criminal justice, regardless of the supervision of this Court in that respect, over the District Courets (McNabb v. United States, 318 U.S. 332(1943). The unjust outcome of the drastic remedy of summary

judgment granted at first instance, was merely corrected in part by the modification permitting the petitioner to curtail in some degree the costs of what was tantamount to an unlawful search and seizure. (Boyd v. United States, supra 116 U. S. 616).

Petitioner is asserting far more grounds of oppression, which are of still greater profundity, than did the plaintiff-appellant, whose pecuniary interest was minimal at the start, in Morningstar v. Lafayette Hotel Co., 211 N.Y.465 (1914). Minor though the original wrong therein was, it let then Judge Cardozo to incorporate indelibly the philosophy of Rudolf von Ihering in his "Struggle for Law," into American jurisprudence. It is the duty of the individual to resist oppression (211 N.Y. supra, at p. 468):

> It is no concern of ours that the controversy at the root of this lawsuit may seem to be trivial. That fact supplies, indeed, the greater reason why the jury should not have been misled into the belief that justice might therefore be denied to the suitor. To enforce one's rights when they are violated is never a legal wrong, and may often be a moral duty. It happens in many instances that the violation passes with no effort to redress it - sometimes from praiseworthy forbearance, sometimes from weakness, sometimes from mere inertia. But the law, which creates a right, can certainly not concede that an insistence upon its enforcement is evidence of a wrong. A great jurist, Rudolf von Ihering, in his
>
> Struggle for Law," ascribes the development of law itself to the persistence in human nature of the impulse to resent aggression, and maintains the thesis that the individual owes the duty to himself and to society never to permit a legal right to be wantonly infringed.

The proceedings in this controversy were so retrogressive that they recall the admonition of Mr.

Justice Day against the over-zealous agents of the Government in Weeks v. United States, 232 U.S. 383, 393 (1914) for their wholesale violation of that petitioner's rights under the Fourth Amendment; the refusal of Chief Judge Cardozo to yield to the "hydraulic pressure" of great causes in Matter of Doyle, 257 N.Y. 244, 268 (1931) and the celebrated pronouncement by Mr. Justice Davis in Ex parte Milligan, 4 Wall. 2 (1866) that the great guarantees of the Constitution must be observed irrespective of the exigencies even of nationally-divisive civil strife (Id. 121).

The law is well-settled that a judge may not emerge from within the Judicial orbit with impunity (Matter of Richarson, 247 N.Y. 401 (1928); Dean v.

Kochendorfer, 237 N.Y. 384 (1924). When he does so at the sacrifice of a litigant's Constitutional rights, his actions are those of the Government (Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 191 (1960); N.A.A.C.P. v. Alabama, 357 U.S. 449, 463 (1958); see, Shelley v. Kramer, 334 U.S. 1. 14-16 and cases there cited (1948).

CONCLUSION

The WRIT OF CERTIORARI should be granted, to vindicate the principles of the Fourth Amendment enunciated by Marshall v. Barlow, Inc., supra. 436 U.S. 307, and to forbid the practice of the unified multiple rejections, by any and all administrative agencies of onerous demands. Otherwise, these exactions will be made

consistently with utter indifference to the existence and vital implications of the provisions of the Constitution and of their authoritative construction by this Court.

The sheer denial by the District Court to petitioner of his right to put on record the relevant facts in support of his defense to the motion for summary judgment beclouded the issues herein before the Court of Appeals. To safe-guard, both in reality and pragmatically, the sanctions conferred by the Fourth Amendment and the correlative limitations of the Constitution, impinged upon herein by the Government, the judgment of affirmance by the United States Court of Appeals for the First Judicial Circuit

should be reviewed as prayed for by petitioner.

Respectfully submitted.

SAM POLUR
Attorney for Petitioner
101 Park Avenue, Suite 1212
New York, New York 10017
Tel.: (212) 227-5816

Attorney Below
RICHARD K. FOSTER, ESQ.
Pole 121, Great Road
Lincoln, Rhode Island 02865

TO: Solicitor General of the United States
Department of Justice
Washington, D.C.

United States Court of Appeals
For the First Circuit

No. 78-1109

UNITED STATES OF AMERICA,
APPELLEE,
v.
TIVIAN LABORATORIES, INC.,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[HON. RAYMOND J. PETTINE, *U.S. District Judge.*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Richard K. Foster and *Foster & Foster*, on brief for appellant.
Lincoln C. Almond, United States Attorney, and *Everett C. Sammartino*, Assistant United States Attorney, on brief for appellee.

December 20, 1978

CAMPBELL, *Circuit Judge*. Appellant Tivian Laboratories, Inc. challenges the constitutionality of the provisions of the Water Pollution Prevention and Control Act (hereinafter, Water Pollution Act), 33 U.S.C. § 1318(a)(1)(A)(v), and the Air Pollution Prevention and Control Act (hereinafter, Air Pollution Act), 42 U.S.C. § 1857c-8(a)(i) (1)(E) (amended by Act Aug. 7, 1977, Pub. L. No. 95-95 § 305(d) and transferred to 42 U.S.C. § 7414(a)(i)(1)(E)) which authorize the Environmental Protection Agency (EPA) to "require the owner or operator of any [emission or point] source . . . to provide [the agency with] such information as [it] may reasonably require" to carry out its responsi-

bilities under the Acts. These provisions, Tivian contends, violate the fourth amendment's prohibition of unreasonable searches and seizures, the thirteenth amendment's bar against involuntary servitude, and the fifth amendment's guarantee of due process.

Tivian is a small corporation engaged in the production of plating solutions, resins, waxes, and chemical specialties for metal casting and finishing. In October 1975 the EPA sent it a letter, requesting detailed information concerning the company's acquisition, use, and disposal of polychlorinated biphenyls (PCBs) and comparable chemical substances. The letter stated that the agency was "attempting to determine the sources and amounts of these chemical substances entering the environment" as part of an investigation into "the nature and extent of the possible adverse effects resulting from [their] presence . . . ." Section 1318 of the Water Pollution Act and § 1857c-9 of the Air Pollution Act were cited as the agency's authority for requesting the information.[1]

[1] 33 U.S.C. § 1318 (1972) (amended 1977) states:

"(a) Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 1315, 1321, 1342, 1344 (relating to State permit programs), and 1364 of this title—

(A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and

Tivian persistently refused to comply with EPA's request. In May 1976 the United States, on behalf of the EPA and pursuant to its authority under the Acts, commenced suit in federal district court to obtain judicial enforcement of its request, 33 U.S.C. §§ 1319(a)(3) & (b)

(B) the Administrator or his authorized representative, upon presentation of his credentials—

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

(b) Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.

(c) Each State may develop and submit to the Administrator procedures under State law for inspection, monitoring, and entry with respect to point sources located in such State. If the Administrator finds that the procedures and the law of any State relating to inspection, monitoring, and entry are applicable to at least the same extent as those required by this section, such State is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources located in such State (except with respect to point sources owned or operated by the United States)."

(1972) (amended 1977); 42 U.S.C. §§ 1857c-8(a)(3) & (b)(4) (1970) (amended and transferred in 1977 to 42 U.S.C. §§ 7413(a)(3) & (b)(4)). The United States also sought, pursuant to its authority under the Water Pollu-

42 U.S.C. § 1857c-9 (1972) (amended 1977) states:

(a) Authority. For the purpose (i) of developing or assisting in the development of any implementation plan under section 110 or 111(d) [42 USCS §§ 1857c-5 or 1857c-6(d)], any standard or performance under section 111 [42 USCS § 1857c-6], or any emission standard under section 112 [42 USCS § 1857c-7], (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (iii) carrying out section 303 [42 USCS § 1857h-1]—

(1) the Administrator may require the owner or operator of any emission source to (A) establish and maintain such records, (B) make such reports, (C) install, use, and maintain such monitoring equipment or methods, (D) sample such emissions (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (E) provide such other information as he may reasonably require; and

(2) the Administrator or his authorized representative, upon presentation of his credentials—

(A) shall have a right of entry to, upon or through any premises in which an emission source is located or in which any records required to be maintained under paragraph (1) of this section are located, and

(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which the owner or operator of such source is required to sample under paragraph (1).

(b) Enforcement by State. (1) Each State may develop and submit to the Administrator a procedure for carrying out this section in such State. If the Administrator finds the State procedure is adequate, he may delegate to such State any authority he has to carry out this section (except with respect to new sources owned or operated by the United States). (2) Nothing in this subsection shall prohibit the Administrator from carrying out this section in a State.

(c) Availability of records, reports, and information to public—Disclosure of trade secrets. Any records, reports or information obtained under subsection (a) shall be available

tion Act, 33 U.S.C. § 1319(d) (1972) (amended 1977), to have civil fines imposed on Tivian for its refusal to supply the data voluntarily.

After pleadings were filed and discovery commenced, the government moved for summary judgment. Tivian responded by challenging the constitutionality of the Acts. At the hearing on the motion, the district court ruled against Tivian on each of its constitutional claims, granted the motion for summary judgment, and ordered Tivian to supply the data sought forthwith. The issue of the assessment of civil penalties was left open until further order of the court. Tivian took a timely appeal, and has been unsuccessful in efforts in this court and below to stay the judgment pending appeal.

The procedure followed by the EPA to obtain information from Tivian was in accordance with the authority conferred upon it under the two Acts. Each Act requires the EPA, in cooperation with other state and federal agencies, to identify and reduce or eliminate the discharge of pollutants into the environment. 33 U.S.C. §§ 1251 *et seq.* (1972) (amended 1977); 42 U.S.C. §§ 1857 *et seq.* (1970) (amended and transferred in 1977 to 42 U.S.C. §§ 7401 *et seq.*) To achieve these objectives, the agency is authorized to request the owner or operator of a company using chemicals which may be hazardous to the environment to

to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) to which the Administrator has access under this section if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code [18 USCS § 1905], except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act or when relevant in any proceeding under this Act.

supply the agency with whatever information it "may reasonably require" to carry out its statutory responsibilities. 33 U.S.C. § 1318(a)(1)(A)(v); 42 U.S.C. § 1851c-9 (a)(i)(1)(E). Upon a company's refusal to comply with the request, the EPA may go to court to have the request enforced. 33 U.S.C. § 1319(a)(3) & (b); 42 U.S.C. § 1857c-8 (a)(3) & (b). It may also seek penalties for violations of the Acts. 33 U.S.C. § 1319(c) & (d); 42 U.S.C. § 1857c-8(c).

Tivian complains that EPA warned it in a letter requesting data that should it fail to provide the data sought, it would be subjected to substantial fines. This attempt by the EPA, allegedly acting in accordance with the Water and Air Pollution Acts, to compel Tivian to produce records without first obtaining a court order or warrant is claimed to have violated appellant's fourth amendment rights.

We find Tivian's contention of a fourth amendment violation to be without merit. In making the contention, Tivian misstates the facts. EPA's letter to Tivian did not refer to the penalty provisions of the Acts or even address the issue of noncompliance. Thus, even assuming the matter were of legal consequence, there is no record support for Tivian's assertion that it was threatened with fines prior to the commencement of this suit. Threats or no, the agency's request for information is not enforceable under the Acts, nor may fines be imposed, until a court order is obtained. Consequently, any contention that the Acts permit the EPA, without first obtaining judicial leave, to force Tivian to produce records is simply untrue. The agency may ask for the data without a court order, but must turn to the court to have its request enforced.

The procedure for data gathering authorized by the Water and Air Pollution Acts is similar to another procedure, the issuance of subpoenas duces tecum, which agencies are commonly authorized to use to procure corporate records. Subpoenas decus tecum used by agencies to obtain

evidence relevant not only to pending charges, but also to investigations into whether charges should issue, have withstood fourth amendment challenges. *See, e.g., Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 201, 208-09 (1946). A subpoena may be issued without first obtaining a court's permission, 327 U.S. at 214, and may be judicially enforced without a showing that probable, or even reasonable, cause exists to believe that a violation of law has occurred. 327 U.S. at 208-09; *Midwest Growers Cooperative Corp.* v. *Kirkemo*, 533 F.2d 455, 461 (9th Cir. 1976) (dicta); *SEC* v. *Howatt*, 525 F.2d 226, 229 (1st Cir. 1975); *EEOC* v. *University of New Mexico*, 504 F.2d 1296, 1303 (10th Cir. 1974); *United States* v. *DeGrosa*, 405 F.2d 926, 928-29 (3d Cir.), *cert. denied sub nom. Zudick* v. *United States*, 394 U.S. 973 (1969). In general, what the fourth amendment requires as a condition to enforcement of an agency subpoena is a showing by the agency (1) that its investigation is authorized by Congress and is for a purpose Congress can order and (2) that the documents sought are relevant to the investigation and adequately described. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. at 209-09; *Midwest Growers Cooperative Corp.* v. *Kirkemo*, 533 F.2d at 455; *EEOC* v. *University of New Mexico*, 504 F.2d at 1302-03; *United States* v. *DeGrosa*, 405 F.2d 926. Tivian has not established that EPA's request fails to meet the grounds in (1), nor does it contend that the requested documents are inadequately described or irrelevant to the agency's investigation. Nothing on the face of the request transgresses these bounds. Hence, we find no fourth amendment violation. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-54 (1950).

Tivian's thirteenth amendment challenge is based on the argument that the practical effect of the demand for records is to compel Tivian to incur an otherwise unnecessary expense, overtime wages, so that its employees can find and

transmit the requested data while keeping up with their normal duties. Being compelled to incur this expense allegedly constitutes involuntary servitude within the thirteenth amendment. Even assuming, however, that a corporation has rights under the thirteenth amendment and that the amendment is not otherwise inapplicable, we find no violation. The thirteenth amendment "has no application to a call for service made by one's government according to law to meet a public need . . ." *Heflin* v. *Sanford*, 142 F.2d 798, 799 (5th Cir. 1944). *See also Abney* v. *Campbell*, 206 F.2d 836, 841 (5th Cir.), *cert. denied*, 346 U.S. 929 (1954); *Shick* v. *New Orleans*, 49 F.2d 870, 872 (5th Cir.), *cert. denied*, 284 U.S. 656 (1931); *Bobilin* v. *Board of Education*, 403 F. Supp. 1095, 1102-05 (D. Hawaii 1975); *St. Louis* v. *Liberman*, 547 S.W.2d 452, 457 (Mo.) (*en banc*), *cert. denied*, 434 U.S. 832 (1977).

Tivian's final challenge to the constitutionality of the Water and Air Pollution Acts, that the taking of its records was without the procedural due process required by the fifth amendment, is also without merit. The Acts provide for procedural due process. When Tivian refused to comply voluntarily, the EPA had to institute suit to obtain enforcement of its request. Before compliance was ordered, Tivian received ample opportunity in the district court to contest the request.

While we thus find no merit whatever in Tivian's constitutional attacks upon the statutes and the agency's actions, there is one further issue. Tivian insists that it should at least be reimbursed by the EPA for the expenses it will incur (or perhaps has incurred) in retrieving and collating the pertinent data. As this claim was advanced below in a memorandum in opposition to the government's motion for summary judgment, we cannot say that it is presently foreclosed; and we believe it should have been ruled upon by the court below. Tivian, to be sure, stated

in its answer and motion to dismiss that it had never used PCBs nor brought them, or chlorinated terphenyls, into the State of Rhode Island. If this is the case, the effort required to respond to EPA's letter should be minor, even though EPA's letter could impose a very considerable burden upon a company dealing with PCBs in quantity. The letter calls not merely for existing records but for an enormous quantity of detailed information going back several years which might require many hours to collect. In cases where compliance with a subpoena would be oppressive, a district court may impose reasonable restrictions and conditions upon its enforcement of the subpoena. Its power in this regard stems from the requirement that "the disclosure sought shall not be unreasonable." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. at 208; *FTC* v. *Texaco, Inc.*, 555 F.2d 862, 881 (D.C. Cir.) (*en banc*), *cert. denied*, 431 U.S. 974 (1977); *Genuine Parts Co.* v. *FTC*, 445 F.2d 1382, 1390 (5th Cir. 1971). *See also United States* v. *Powell*, 379 U.S. 48, 58 (1964); *United States* v. *Davey*, 543 F.2d 996, 1000 (2d Cir. 1976); *cf. SEC* v. *Howatt*, 525 F.2d at 229.

It is only, however, in very extreme circumstances that it is appropriate for a court to impose conditions of this nature and we do not mean to suggest that such circumstances necessarily or indeed are likely to exist here. *FTC* v. *Texaco, Inc.*, 555 F.2d at 882; *SEC* v. *Savage*, 513 F.2d 188, 189-90 (7th Cir. 1975); *Genuine Parts Co.* v. *FTC*, 445 F.2d 1382; *see In Re Grand Jury Investigation*, 47 U.S.L.W. 2320, 2321 (E.D. Pa. 1978). "Some burden on subpoenaed parties is to be expected, . . . is necessary in furtherance of the agency's legitimate inquiry and the public interest," *FTC* v. *Texaco, Inc.*, *supra*, and must be borne as a cost of doing business. *United States* v. *Friedman*, 532 F.2d 928, 938 (3d Cir. 1976); *see FTC* v. *Rockefeller*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977). The burden

of proving that the request is oppressive is on the party objecting to the agency's request. *United States* v. *Powell*, 279 U.S. 48; *FTC* v. *Texaco, Inc., supra; United States* v. *Davey*, 543 F.2d 996; *FTC* v. *Rockefeller, supra.*

In the instant case, we merely hold that Tivian is entitled to the ruling of the district court on this limited issue. Given the lengthy delay in complying with EPA's request, we feel that Tivian must take all reasonable steps forthwith to comply with EPA's request, if it has not yet done so. Such compliance is not to be withheld pending the district court's ruling on the collateral cost issue.

The judgment of the district court is affirmed in all respects, except the case is remanded to the district court for the limited purpose of determining Tivian's claim that compliance is so burdensome as to entitle it to reimbursement for the costs of compliance.

So ordered.

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